APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16257

ANCHOR LINE LIMITED, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, and
UNITED STATES OF AMERICA, RESPONDENTS

On Petition for Review of an Order of
the Federal Maritime Commission

Decided February 1, 1962

Mr. Ronald A. Capone, with whom *Messrs. Elmer C. Maddy* and *Robert H. Binder* were on the brief, for petitioners.

Mr. Edward Schmeltzer, Attorney, Federal Maritime Commission, with whom *Messrs. Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, and *Irwin A. Seibel*, Attorney, Department of Justice, were on the brief, for respondents. *Mr. Richard A. Solomon*, Attorney, Department of Justice, also entered an appearance for respondent United States of America.

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BAZELON, *Circuit Judge:* In a report and order, decided December 14, 1959, and served March 2, 1960, the Federal Maritime Commission held that allegations of a complaint,

charging petitioners with violations of § 15 of the Shipping Act, had not been sustained. After the complainants in that case filed a review petition in this Court, the Commission reopened the proceedings. Subsequently the Commission moved to dismiss the petition, but its motion was denied. Upon the original record and oral argument, the Commission entered a "second report and order," decided January 23, 1961, and served the following day, wherein it vacated its first report and order and held that petitioners had engaged in activities in violation of § 15 of the Act. Petitioners bring the instant petition to review and set aside the "second report and order."

Petitioners contend first that the Commission lacked authority to reopen the proceedings because a petition to review the first order was then pending in this Court.[1] We think, however, that the pendency of a review petition does not automatically bar reopening of an administrative proceeding. *Wrather-Alvarez Broadcasting* v. *Federal Communications Comm'n*, 101 U.S.App.D.C. 324, 248 F.2d 646 (1957). See *Frontier Airlines* v. *Civil Aeronautics Board*, 104 U.S.App.D.C. 78, 259 F.2d 808 (1958); *WORZ, Inc.* v. *Federal Communications Comm'n*, 106 U.S.App. D.C. 14, 268 F.2d 889 (1959). It is true that when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency.[2] We do not condone the failure to follow that procedure. But since this failure was not prejudicial in the circumstances of the present case, we do not disturb the Commission's action in reopening the proceedings.

Petitioners also contend that the Commission failed to make findings in compliance with its rule that a reopening

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[1] The Shipping Act of 1916 provides that "the Board may reverse, suspend, or modify upon such notice and in such manner as it deems proper, any order made by it." Shipping Act § 25, 39 Stat. 736 (1916), 46 U.S.C. § 824 (1958).

[2] See *Wrather-Alvarez Broadcasting Co.* v. *Federal Communications Comm'n*, *supra*. *Cf. Smith* v. *Pollin*, 90 U.S.App.D.C. 178, 194 F.2d 349 (1952).

will be ordered if the Commission "*finds* such action is required by changed conditions in fact or law or by the public interest." 46 C.F.R. § 201.261 (1958) (emphasis supplied). But petitioners failed to raise this objection before the Commission, and we find no compelling reason to consider it. *United States* v. *Tucker Truck Lines*, 344 U.S. 33 (1952); *Albertson* v. *Federal Communications Comm'n*, 100 U.S.App.D.C. 103, 243 F.2d 209 (1957); *Barclay Home Prod.* v. *Federal Trade Comm'n*, 100 U.S. App.D.C. 46, 241 F.2d 451, *cert. denied*, 354 U.S. 942 (1957).

Petitioners also complain that the Commission's findings respecting their violations of § 15 are not supported by substantial evidence and reasons. We think the report and order under review, printed *sub nom.*, *Maatschappij "Zeetransport" N.V. (Oranje Line)* v. *Anchor Line Ltd.*, in PIKE & FISCHER SHIPPING REG. 211 (decided Jan. 23, 1961), cite ample evidence and reasons to support the Commission's conclusions.[1] Accordingly, the order is

Affirmed.

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[1] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951); *National Labor Relations Board* v. *Southland Mfg. Co.*, 201 F.2d 244 (4th Cir. 1952); *Minkoff* v. *Payne*, 93 U.S.App.D.C. 123, 210 F.2d 689 (1953). Petitioners have directed our attention to alleged discrepancies between a few statements in the Board's second report and order and certain advertisements appearing in the record. These discrepancies, if such they be, are too insubstantial to affect our decision.

Constitutional Provisions, Statutes and Rules Involved

U. S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Shipping Act, 1916

Section 1:

> The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."
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> The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.
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> The term "common carrier by water" means a common carrier by water in foreign commerce or a com-

mon carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

Section 15:

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modifications, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 22:

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders or the payment of money, with the same powers, investigate any violation of this Act.

Administrative Procedure Act

Section 8(b):

Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and

include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Federal Maritime Commission Rules

Rule 16(a):

Reopening by Board and modification or setting aside of report or order. Upon petition or its own motion, the Board may at any time after reasonable notice, reopen any proceeding under these rules for rehearing, reargument, or reconsideration and, after opportunity for hearing, may alter, modify, or set aside in whole or in part its report of findings or order therein if it finds such action is required by changed conditions in fact or law or by the public interest.